TABLE OF CONTENTS – APPENDIX

Page

1. Opinion, *United States v. Culliton*, 300 F.3d 1139 (9th Cir. 2002) ..... App. 1

2. Opinion, *United States v. Culliton*, 328 F.3d 1074 (9th Cir. 2003) ..... App. 12

3. Order Denying Petition for Rehearing and Rehearing En Banc, *United States v. Culliton*, No. 00-10599, August 25, 2003 ..... App. 27

4. Amicus Letter of Aircraft Owners and Pilots Association, filed 7/30/03 ..... App. 28

5. FAA form 8500-8 for James Michael Culliton dated June 6, 1997 ..... App. 32

APPENDIX 1

300 F.3d 1139

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES M. CULLITON, Defendant-Appellant.

No. 00-10599

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

June 12, 2002, Argued and Submitted, San Francisco, California

August 22, 2002, Filed

NOTICE:

THIS OPINION WAS WITHDRAWN BY THE COURT.

SUBSEQUENT HISTORY:

Opinion withdrawn by, Substituted opinion at *United States v. Culliton*, 2003 U.S. App. LEXIS 8134 (9th Cir. Cal., Apr. 30, 2003)

PRIOR HISTORY:

Appeal from the United States District Court for the Eastern District of California. D.C. No. CR-99-00537-EJG. Edward J. Garcia, District Judge, Presiding.

DISPOSITION:

Defendant's conviction reversed.

COUNSEL:

Richard Staff, Sacramento, California, for the defendant-appellant.

James P. Arguelles, Assistant U.S. Attorney, Sacramento, California, for the plaintiff-appellee.

JUDGES:

Before: Alfred T. Goodwin, Michael Daly Hawkins and Raymond C. Fisher, Circuit Judges. Opinion by Judge Hawkins.

OPINION BY:

Michael Daly Hawkins

OPINION:

HAWKINS, Circuit Judge:

Culliton appeals his conviction under 18 U.S.C. § 1001 for making false statements on a medical form submitted to the Federal Aviation Administration ("FAA"). He argues the form is fundamentally ambiguous and therefore the district court should have dismissed the indictment. Joining the only other circuit to address the issue,[1] we conclude that the challenged questions on the FAA form are sufficiently confusing, vague and overbroad as to invite selective prosecution. Consequently, we reverse Culliton's conviction.[2]

---

[1] *See United States v. Manapat,* 928 F.2d 1097 (11th Cir. 1991).

[2] Nothing in this opinion should be read to restrict the ability of the FAA to continue to use this form to elicit medical information from prospective and current pilots and to respond to false or inaccurate statements on the form as a basis for administrative discipline, including license forfeiture.

BACKGROUND

James Culliton is an aviation lawyer and pilot. In August 1995, he reclined in a chair that broke and tipped over, which caused him to hit his head on a credenza nearby. Following the accident, Culliton was treated for vision problems, dizziness, headaches, memory loss and depression. As a result of his injuries, Culliton brought a private civil action against three defendants, eventually reaching a settlement with two of them. The third, Viking Office Products, asserted a defense of insurance fraud and refused to settle. Apparently dissatisfied with available civil relief, Viking decided to seek criminal sanctions, transferring Culliton's confidential medical records to its private investigators who in turn convinced California State investigator, Alberto Perez, to seek criminal prosecution. Perez first sought out the Sacramento County District Attorney's office, which declined to file a criminal complaint. Undeterred, Perez took the matter to the United States Attorney's office, which presented the information to a grand jury. The grand jury returned an indictment for a violation of 18 U.S.C. § 1001, which prohibits making materially false statements on matters within the jurisdiction of the federal government.[3]

---

[3] The statute, 18 U.S.C. § 1001, states in relevant part:

Whoever . . . knowingly and willfully –

(1) falsifies, conceals or covers up . . . a material fact; [or]

(2) makes any materially false, fictitious or fraudulent . . . statement or representation;

shall be fined under this title or imprisoned not more than 5 years, or both.

The basis for that indictment occurred in June 1997 when Culliton had filled out a federal FAA Form 8500-8 to obtain an airman medical certificate.[4] Culliton checked the NO box to the three issues mentioned in the following question:

> 18. Have you ever had or have you now, any of the following? Answer "yes" for every condition you have ever had in your life. In the EXPLANATION box below, you may note "PREVIOUSLY REPORTED, NO CHANGE" only if the explanation of the condition was reported on a prior application for an airman medical certificate and there has been no change in your condition.: . . . (b) dizziness or fainting spells, . . . (d) eye or vision trouble except glasses, [and] . . . (m) mental disorders of any sort: depression, anxiety, etc.

Culliton appealed after being convicted and sentenced.

ANALYSIS

This case presents the question whether the district court erred in submitting this matter to the jury because the questions which prompted the defendant's false statements are so fundamentally ambiguous that the court should have dismissed the indictment under Section 1001 as a matter of law. Generally speaking, the existence of

---

[4] Form 8500-8 is submitted every year by pilots seeking recertification and includes about 40 yes/no questions. The origins of this case were recounted in Culliton's brief and in the excepts of record. The details were not contested by the government in either its response to Culliton's motion to dismiss or in its brief on appeal.

some ambiguity in a falsely answered question will not shield the respondent from a perjury or false statement prosecution. *United States v. Slawik,* 548 F.2d 75, 86 (3d Cir. 1977). Normally, it is for the jury to decide which construction the defendant placed on a question. *Id.* If however, a question is "excessively vague, or 'fundamentally ambiguous,'" the answer may not, as a matter of law, form the basis of a prosecution for perjury or false statement. *United States v. Ryan,* 828 F.2d 1010, 1015 (3d Cir. 1987) (citing *United States v. Lighte,* 782 F.2d 367, 375 (2d Cir. 1986)), *abrogated on other grounds by United States v. Wells,* 519 U.S. 482, 486 n.3, 137 L.Ed.2d 107, 117 S. Ct. 921 (1997). *Ryan* determined that this point is reached "when it is entirely unreasonable to expect that the defendant understood the question" or when persons of ordinary intellect cannot agree on the question's meaning. *Ryan,* 828 F.2d at 1015.

This Court has not previously addressed the question of excessive vagueness in the Section 1001 context. But we have addressed this issue in the analogous context of 18 U.S.C. § 1623 (false statements to a grand jury or court). *See United States v. Boone,* 951 F.2d 1526 (9th Cir. 1991).

> A question is fundamentally ambiguous when it is not a phrase with a meaning about which men of ordinary intelligence could agree, nor one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as testimony.

Id. at 1534 (internal citations and quotation marks omitted). In the context of witnesses later being charged for perjury, precise questioning has been determined as a necessity for three reasons:

> to (1) preclude convictions grounded on surmise or conjecture; (2) prevent witnesses from unfairly bearing the risks of inadequate examination; and (3) encourage witnesses to testify (or at least not discourage them from doing so). Unfortunately, line drawing is inevitable, for to precisely define the point at which a question becomes fundamentally ambiguous, and thus not amenable to jury interpretation, is impossible.

United States v. Farmer, 137 F.3d 1265, 1269 (9th Cir. 1998) (citations omitted).

Our task then is to determine whether the Form asked excessively vague questions. If we determine that the questions were only "arguably ambiguous" or not ambiguous at all, then the district court was correct to ask the jury to determine whether it "could conclude beyond a reasonable doubt that the defendant understood the question as did the government and that, so understood, the defendant's answer was false." *Boone,* 951 F.2d at 1533 (internal quotation marks omitted). *See also United States v. Bonacorsa,* 528 F.2d 1218, 1221 (2d Cir. 1976) ("Absent fundamental ambiguity or impreciseness in the questioning, the meaning and truthfulness of appellant's answer was for the jury.").

In *Bronston v. United States,* 409 U.S. 352, 362, 34 L. Ed. 2d 568, 93 S. Ct. 595 (1973), the Supreme Court, reversing a perjury conviction, ruled that "precise questioning is imperative as a predicate for the offense of perjury." Convictions for false statements under Section 1001 are closely analogous. Therefore we must look to the questions on the Form and see whether those questions are sufficiently precise. *See Lighte,* 782 F.2d at 375 ("When a line of questioning is so vague as to be 'fundamentally

ambiguous,' the answers associated with the questions posed may be insufficient as a matter of law to support the perjury conviction. Inasmuch as the issue then becomes one of legal sufficiency, a reviewing court may override a jury determination.") (internal citations omitted).

The government argues that Culliton's answers to the Form were properly submitted to the jury because the district court instructed the jury that Culliton thought the questions were ambiguous and that Culliton's "understanding of the questions is a matter for the jury to decide." This begs the question: whether they were sufficiently vague or ambiguous as to preclude prosecution for a false statement.

At argument, the government acknowledged that the FAA Form questions were capable of rendering innocent responses objectively false. For example, the Form asks if one has ever experienced dizziness. The government conceded that a prospective pilot whose dizziness resulted from once participating in the game of "Dizzy Izzy" could still properly check "No" on the FAA Form.[5] This response would be both "innocently" true but objectively false, thereby subjecting the respondent to criminal prosecution.

The same vagueness afflicts the other questions that served as the basis for the indictment in this case. Culliton was asked on the Form: Have you ever had mental disorders

[5] "Dizzy Izzy" is a contest, often put on between innings of baseball games, in which two spectators are invited down to the field, where they place their foreheads on top of a baseball bat standing on the ground and then circle the bat a number of times, after which they must run in a straight line down the field.

of any sort? This question tempts a range of answers. It may invite a "Yes" answer from someone without any history of diagnosis by a licensed clinician and it may elicit a "No" answer from someone who has had a medical diagnosis but disagrees with that diagnosis, perhaps because another clinician rejected the earlier diagnosis. Because the question is capable of several meanings,[6] we refuse to permit objectively false answers to the question to serve as a basis for false statement prosecutions. The uncertain nature of the question is precisely what makes it sufficiently vague as to preclude criminal prosecution.

The question asking about eye or vision trouble invites the same confusion. Someone who once had a bug fly into an eye while riding a bicycle and had to stop to remove it has had eye or vision trouble. Is it proper to check the "No" box? Reasonable people might offer different answers, but criminal prosecutions should not depend upon those differing answers. (And at the very least, a prosecution should not be contingent upon which person or entity one has recently offended in an unrelated civil lawsuit.)

The FAA itself has expressed concerns about the vagueness of the Form in the past. The Broderick Memorandum, a 1987 FAA document, noted that the FAA needed to "think about changing the form and substance of the questions asked in" Form 8500-8, in part because the

---

[6] The question may mean: "Do you think you have ever had a mental disorder?" It is also capable of meaning "Have you been diagnosed with a mental disorder?"

"vague, qualitative, and evaluative nature of these questions" has made difficult the prosecution of people in the past.[7]

Because the questions are confusing and capable of various meanings, we do not think a conviction based on answers to those questions is consistent with someone's protected Due Process rights – the questions invite the arbitrary deprivation of liberty interests by selective enforcement.

We are bound by the Supreme Court's instructions on vagueness as it pertains to criminal convictions. "Vagueness is constitutionally problematic when a criminal statute either 'fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits[, or] may authorize and even encourage arbitrary and discriminatory enforcement.'" *City of Chicago v. Morales,* 527 U.S. 41, 56, 144 L. Ed. 2d 67, 119 S. Ct. 1849, (1999) (citing *Kolender v. Lawson,* 461 U.S. 352, 357, 75 L. Ed. 2d 903, 103 S. Ct. 1855, (1983)). It is not our conclusion that 18 U.S.C. § 1001 is "so vague and standardless that it leaves the public uncertain as to the conduct it prohibits." Rather, the Form that served as the basis for the false statements is so vague that a conviction based

---

[7] The government asserts that the Memo is only about "drug convictions" and "alcohol-related driving convictions," and that the Memo is "silent on the topic of medical history questions of Form 8500-8." Its references to vagueness are therefore inapposite, claims the government. We disagree. It is true that the Memo mentions questions about convictions, but the Memo in no way indicates that the questions that are vague are limited to those about convictions. The comment about vagueness is in the last and separate paragraph. [*See* Supplemental Excerpts of Record at 145.]

thereon "fails to meet the requirements of the Due Process Clause." 527 U.S. at 56. The Constitution does not permit the government to "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States v. Reese,* 92 U.S. 214, 221, 23 L. Ed. 563 (1876).

Here, the broad sweep of the language in the Form violates the requirement that the government "establish minimal guidelines to govern law enforcement." *Morales,* 527 U.S. at 60 (internal quotation marks omitted). Given the unusual circumstances in which this case arose, we are particularly leery of permitting prosecutors to use the criminal laws as part of a "standardless sweep . . . to pursue their personal predilections." *Kolender,* 461 U.S. at 358 (internal quotation marks omitted). As the defendant notes, everyone has been dizzy in their life (perhaps by playing childhood games) and everyone at some point has headaches or anxiety. If all applicants answered yes to these questions, the government would be forced to engage in extensive and often unnecessary medical exams. Even Dr. Silberman, the senior flight surgeon of the FAA, stated that Form questions left it "up to the airman" to report certain conditions. Thus, any prosecution on the basis of such questions would necessarily be arbitrary.

Our holding that the Form does not survive constitutional vagueness scrutiny is bolstered by the conclusions of our sister Circuit, which has similarly found unacceptable

convictions arising from false statements from this Form.[8] *See United States v. Manapat,* 928 F.2d 1097 (11th Cir. 1991). Although that decision focused on questions about prior convictions, the Eleventh Circuit saw questions on that Form as fundamentally ambiguous, therefore precluding criminal prosecutions under Section 1001.[9] Specifically, the Eleventh Circuit said "the government may not provide someone with a confusing and ambiguous form and then prosecute when the answers are inaccurate." *Id.* at 1102. We agree.

REVERSED.[10]

---

[8] There are some very minor (and for our purposes, irrelevant) differences between the FAA Form under consideration in *Manapat* and the one here.

[9] It is worth noting that the questions sparking the controversy in *Manapat,* which asked respondents about prior convictions, required answers that are far more objective than whether someone has or had a mental disorder or vision trouble.

[10] Because we reverse the conviction, we refrain from addressing Culliton's suggestion that the criminal prosecution was improper before the FAA took administrative action.

APPENDIX 2

328 F.3d 1074

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES M. CULLITON, Defendant-Appellant.

No. 00-10599

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

June 12, 2002, Argued and Submitted, San Francisco, California

April 30, 2003, Filed

PRIOR HISTORY:

Appeal from the United States District Court for the Eastern District of California. D.C. No. CR-99-00537-EJG. Edward J. Garcia, District Judge, Presiding. *United States v. Culliton*, 300 F.3d 1139, 2002 U.S. App. LEXIS 17347 (9th Cir. Cal., 2002)

DISPOSITION:

Affirmed.

COUNSEL:

Richard Staff, Sacramento, California, for the defendant-appellant.

James P. Arguelles, Assistant U.S. Attorney, Sacramento, California, for the plaintiff-appellee.

JUDGES:
Before: Alfred T. Goodwin, Michael Daly Hawkins and Raymond C. Fisher, Circuit Judges.

OPINION:

ORDER

The opinion filed August 22, 2002, and appearing at 300 F.3d 1139 (9th Cir. 2002), is WITHDRAWN. It may not be cited as precedent by or to this court or any district court of the Ninth Circuit.

PER CURIAM:

James Culliton appeals his felony conviction under 18 U.S.C. § 1001 for making false statements on a medical form submitted to the Federal Aviation Administration ("FAA"). Culliton bases his appeal on three legal theories: First, the FAA form is fundamentally ambiguous and therefore the district court should have dismissed the Government's false statement indictment. Second, Culliton's felony conviction resulted from selective prosecution and therefore amounted to a denial of Due Process. Third, the doctrine of primary jurisdiction prevented the district court from presiding over Culliton's indictment until, and unless, the FAA first revoked his medical certification.

We reject all three theories and affirm Culliton's conviction, after a jury trial, for making knowing and willful false statements in a matter within the jurisdiction of the FAA.

BACKGROUND

James Culliton is an aviation lawyer, a pilot, and a former inspector for the FAA. In August 1995, he reclined

in a chair that broke and tipped over, causing him to hit the back of his head against a credenza nearby. Following the accident, Culliton sought treatment from various health professionals, including a primary care physician, an ophthalmologist, and a neurologist, for a variety of medical problems. For almost two years after the accident, Culliton complained of decreased vision in the right eye, occasional double vision, dizziness, nausea, persistent headaches, difficulty with concentration, personality-type changes, and anxiety attack symptoms.

Culliton brought a personal injury action against three defendants responsible for manufacturing and retailing the defective chair. Two of the defendants agreed to settle for $500,000 while the third defendant, Viking Office Products, asserted a defense of insurance fraud and refused to settle. At this point, the parties' accounts of the subsequent events diverge.

Culliton contends that Viking's private detectives convinced a state investigator for the California Department of Insurance to pursue a fraud prosecution through the Sacramento County District Attorney's Office. When the D.A.'s office refused to proceed, the state investigator prevailed upon the U.S. Attorney for the Eastern District of California to prosecute Culliton for false statements made to the FAA about his medical history.

The Government maintains that this prosecution was not "selective." It asserts that Viking originally reported its suspicion of insurance fraud to the county D.A.'s office which, because of lack of funding, referred the matter to the California Department of Insurance for further investigation. In the course of preparing its case, one of the department's investigators learned of Culliton's false

statements to the FAA. When the department determined that it would not bring a fraud action, it referred the case to the U.S. Attorney's Office for possible federal prosecution under 18 U.S.C. § 1001. The statute provides in relevant part:

> [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully – (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both.

The basis for the Government's prosecution occurred in June 1997 when Culliton, in the course of obtaining an airman medical certificate, answered "No" to the following three questions contained in FAA Form 8500-8:[1]

Have you *ever* had or have you now, any of the following? Answer "yes" for every condition you have ever had in your life. In the EXPLANATION box below, you may note "PREVIOUSLY REPORTED, NO CHANGE" only if the explanation of the condition was reported on a prior application for an airman medical certificate and there has

---

[1] As the Privacy Act Statement attached to Form 8500-8 explains, "the purpose of the information is to determine whether you meet Federal Aviation Administration medical requirements to hold an airman medical certificate or airman medical and student pilot certificate."

been no change in your condition. See instructions page. (Emphasis in original.) (b) dizziness or fainting spells – Yes or No

(d) eye or vision trouble except glasses – Yes or No

(m) mental disorders of any sort: depression, anxiety, etc. – Yes or No

The instructions page provides:

MEDICAL HISTORY – Each item under this heading must be checked either "yes" or "no." You must answer "yes" for every condition you have ever had in your life and describe the condition and approximate date in the EXPLANATIONS box.

If information has been reported on a previous application for airman medical certificate and there has been no change in your condition, you may note "PREVIOUSLY REPORTED, NO CHANGE" in the EXPLANATIONS box, but you must still check "yes" to the condition. Do not report occasional common illnesses such as colds or sore throats.

Even though Culliton recently sought medical treatment for dizziness, vision problems, and anxiety symptoms, *see supra,* he answered "No" to each query recited above. After a four day trial, a jury convicted Culliton of knowingly providing false statements to a federal agency in violation of 18 U.S.C. § 1001 and the court imposed a fine of $5,000. Culliton filed a timely notice of appeal. We have jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291, and affirm the judgment.

ANALYSIS

I. Fundamental Ambiguity of FAA Form 8500-8

Culliton's first argument on appeal is that the district court should have dismissed his indictment because of the "fundamental ambiguity" of FAA Form 8500-8 ("Form") and its questions. This circuit has not yet defined the standard of review for the dismissal of a false statement indictment based on fundamental ambiguity. We need not do so here because the Form is not ambiguous under any standard of review.

Generally speaking, the existence of some ambiguity in a falsely answered question will not shield the respondent from a perjury or false statement prosecution. *See United States v. Ryan,* 828 F.2d 1010, 1015 (3d Cir. 1987) *abrogated on other grounds by United States v. Wells,* 519 U.S. 482, 486 n.3, 137 L. Ed. 2d 107, 117 S. Ct. 921 (1997). It is for the jury to decide in such cases which construction the defendant placed on a question. *See United States v. Slawik,* 548 F.2d 75, 86 (3d Cir. 1977). If, however, a question is "excessively vague, or 'fundamentally ambiguous,'" the answer may not, as matter of law, form the basis of a prosecution for perjury or false statement. *Ryan,* 828 F.2d at 1015 (citing *United States v. Lighte,* 782 F.2d 367, 375 (2d Cir. 1986)); *see also United States v. Bonacorsa,* 528 F.2d 1218, 1221 (2d Cir. 1976) ("Absent fundamental ambiguity or impreciseness in the questioning, the meaning and truthfulness of appellant's answer was for the jury.").

While this court has not had the occasion to consider the effect of fundamental ambiguity in the specific context of providing false statements to a federal agency in violation of 18 U.S.C. § 1001, in *United States v. Boone,* 951

F.2d 1526 (9th Cir. 1991), we addressed "ambiguity" in the analogous context of providing false statements to a grand jury or court in violation of 18 U.S.C. § 1623. A question is fundamentally ambiguous when "men of ordinary intelligence" cannot arrive at a mutual understanding of its meaning. *See Boone,* 951 F.2d at 1534 (quoting *Lighte,* 782 F.2d at 375).

Culliton describes the Form's medical history questions as fundamentally ambiguous because they are "unanswerable in any meaningful way" and "incomprehensible in the context in which they were presented." He argues that the questions "make no sense at all" because "[n]one of us can literally deny a history of dizziness, headaches, vision problems, mental problems, and the like." Underlying these descriptions is his basic contention that because the FAA questions permit different interpretations by the questioner and respondent, they are fundamentally ambiguous and cannot serve as the basis for a false statement prosecution.

However, a question is not fundamentally ambiguous simply because the questioner and respondent might have different interpretations. Rather, we must consider the context of the question and Culliton's answers, as well as other extrinsic evidence relevant to his understanding of the questions posed in the Form. *See Boone,* 951 F.2d at 1534 ("In evaluating . . . the question's ambiguity, the court must consider the context in which the question was asked . . . ."); *see also United States v. Sainz,* 772 F.2d 559, 562 (9th Cir. 1985) ("[W]e must look to the context of the defendant's statement to determine whether the defendant and his questioner joined issue on a matter of material fact to which the defendant knowingly uttered a false declaration."). If Culliton's responses were false as he

understood the questions, "his conviction is not invalidated by the fact that his answer to the question[s] might generate a number of different interpretations." *United States v. Swindall,* 971 F.2d 1531, 1553 (11th Cir. 1992) (internal quotation marks omitted).

Culliton does not claim that he believed his answers were true at the time he filled out the Form. Instead, he claims that he "didn't answer some questions literally because literal answers would have been unreasonable and even impudent." Culliton went so far as to "reasonably interpret[ ] the spirit of the medical questionnaire to relate to facts which may medically disqualify him from flying as a command pilot" – which, under Culliton's interpretation, did not include visual impairment, inability to concentrate, and neurological disorders. Culliton points to no case, and indeed we have found none, that justifies an applicant's unilateral reinterpretation of questions on a governmental form to comport with his own particular goals.

Furthermore, a de novo examination of the Form does not reveal fundamental ambiguity about questions that ask whether a pilot has *ever* had any history of dizziness, vision trouble, or mental disorders. We recognize, and the Government concedes, that the Form's questions are capable of rendering innocent responses objectively false.[2]

---

[2] The FAA has expressed concerns about the possible vagueness of the Form in the past. The Broderick Memorandum, a 1987 FAA document, noted that the FAA needed to "think about changing the form and substance of the questions asked in" Form 8500-8, in part because the "vague, qualitative, and evaluative nature of these questions" has made difficult the prosecution of people in the past. If the FAA sees fit to change the questions, it is well within its domain to do

(Continued on following page)

A respondent might feel compelled to account for dizziness experienced while playing harmless games, vision problems experienced while undergoing routine eye dilation, and mental disorders experienced because of irrelevant traumas. That a respondent might feel compelled to answer "Yes" to each of these questions does not render them "fundamentally ambiguous." Rather, the respondent has the option of explaining his or her answers in a separate space provided on the Form.

As for those individuals who answer "no," assuming that the questions were not meant to be read literally, it might indeed be unfair, as Culliton contends, to allow government prosecution for innocent answers that are objectively false. However, the law already provides protection against that possibility. "Perjury requires that a witness believe that the testimony he gives is false." *Lighte,* 782 F.2d at 372; *see also United States v. Matthews,* 589 F.2d 442, 445 (9th Cir. 1978) (the critical inquiry is the meaning attached to the question by the accused); *United States v. Lattimore,* 127 F. Supp. 405, 408 n.10 (D.D.C. 1955) ("It does not make any difference whether the statements were in fact true or not – the defendant's belief as to their truth or falsity is the issue.").

In the face of ambiguity, a court may decide as a matter of law to dismiss an indictment so long as the defendant offers an innocent explanation for his testimony. As we have discussed, Culliton has provided no such

---

so. This memorandum, however, does not change our conclusion that any vagueness in these questions does not rise to the level of fundamental ambiguity.

innocent explanation. The ambiguity he points to in the questions – that read literally they seem to require disclosure of every incident of dizziness or vision trouble, no matter how minor or fleeting – simply does not account for his failure to disclose the far more severe physical and mental impairments that formed the basis of his personal injury action.

Culliton relies heavily on *United States v. Manapat,* 928 F.2d 1097 (11th Cir. 1991), in which the Eleventh Circuit held that a prior version of Form 8500-8 was fundamentally ambiguous despite the fact that the defendant's answers to two questions regarding her criminal history were objectively false. However, as the district court correctly pointed out in its order refusing to dismiss Culliton's indictment, *Manapat* concerned a different version of the Form. More importantly, *Manapat* speaks to the ambiguity that resulted when two questions about criminal convictions were interspersed with a string of medical history questions. *See* 928 F.2d at 1102. The court concluded that an applicant might believe that the form was asking about convictions that were related to medical convictions, or that an applicant in good health could check many items on the form without realizing that two of the questions asked about criminal convictions, rather than medical problems. *Id.* at 1101. No such ambiguity exists in this case. The Form, and the questions at issue, deal exclusively with an applicant's medical history. A privacy statement and a detailed set of instructions attached to the Form explicitly state that the purpose of the Form is to establish the applicant's physical fitness to fly. Culliton has failed to demonstrate that the questions he answered falsely are fundamentally ambiguous.

II. Selective Prosecution

Culliton next urges us to overturn his false statement conviction because it resulted from what he calls the Government's selective prosecution. He contends that "this case would not have been prosecuted as a Title 18 U.S.C. § 1001 case were it not for the underlying suspicion of insurance fraud," and therefore that his prosecution essentially "amounts to prosecutorial abuse and a perversion of any legitimate law enforcement function."

This court has employed both a de novo standard and a clearly erroneous standard when reviewing a selective prosecution claim. *See United States v. Wilson,* 639 F.2d 500, 503 n.2 (9th Cir. 1981) (adopting clearly erroneous standard but recognizing that past cases have adopted an implicit de novo standard). Because we hold that Culliton has no viable selective prosecution claim under any standard of review, we need not resolve any purported difference. In cases where invidious selective prosecution is alleged, we view the evidence in the light most favorable to the government. *See United States v. Cuellar,* 96 F.3d 1179, 1182 (9th Cir. 1996).

In our criminal justice system, the executive branch has "broad discretion" to decide whom to prosecute. *Wayte v. United States,* 470 U.S. 598, 607, 84 L. Ed. 2d 547, 105 S. Ct. 1524, (1985) (quoting *United States v. Goodwin,* 457 U.S. 368, 380 n.11, 73 L. Ed. 2d 74, 102 S. Ct. 2485, (1982)). However, prosecutorial discretion is not unfettered, and selectivity in the enforcement of criminal laws is subject to constitutional constraints. *See id.* "The two elements of a selective prosecution claim are that others similarly situated have not been prosecuted and that the allegedly discriminatory prosecution of the defendant was

based on an impermissible motive." *United States v. Balk,* 706 F.2d 1056, 1060 (9th Cir. 1983) (internal quotation marks omitted). The defendant has the burden of proving both elements. *United States v. Bourgeois,* 964 F.2d 935, 938 (9th Cir. 1992).

We examine Culliton's selective prosecution claim with the caveat that the "decision to prosecute is particularly ill-suited to judicial review" because factors such as the "strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte,* 470 U.S. at 607.

A de novo review of the evidence in the light most favorable to the government does not reveal an impermissible motive driving Culliton's prosecution. While it may be true that the California Department of Insurance suspected Culliton of fraud, it was under an independent obligation to report its findings of Culliton's false statements to the FAA. As the Government correctly points out, there is nothing inappropriate or vindictive about a state law enforcement agency referring potential violations of federal law to federal authorities. *See Elkins v. United States,* 364 U.S. 206, 221, 4 L. Ed. 2d 1669, 80 S. Ct. 1437, (1960) (in a case involving tainted evidence, the Court emphasized that "[f]ree and open cooperation between state and federal law enforcement officers is to be commended and encouraged.").

III. Primary Jurisdiction

Culliton's final argument on appeal is that the district court should have deferred consideration of his false statement prosecution under the doctrine of primary jurisdiction. This circuit has not yet discussed the standard of review for the application of the primary jurisdiction doctrine. Because we can affirm the district court's decision not to invoke the doctrine of primary jurisdiction under de novo review, we find it unnecessary to speculate further on the proper standard in these types of cases.

The primary jurisdiction doctrine provides: "When there is a basis for judicial action, independent of agency proceedings, courts may route the threshold decision as to certain issues to the agency charged with primary responsibility for governmental supervision or control of the particular industry or activity involved." *United States v. General Dynamics Corp.,* 828 F.2d 1356, 1362 (9th Cir. 1987) (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic No. 99,* 400 U.S. 62, 68, 27 L. Ed. 2d 203, 91 S. Ct. 203, (1970)). Culliton argues that the district court should have deferred the Government's prosecution under 18 U.S.C. § 1001 until, and unless, the FAA made independent findings of false statements and initiated its own revocation proceedings.

Whether the doctrine of primary jurisdiction applies in any particular situation depends on "the extent to which Congress, in enacting a regulatory scheme, intends an administrative body to have the first word on issues arising in juridical proceedings." *Id.* at 1362 (citing *United States v. RCA,* 358 U.S. 334, 339, 3 L. Ed. 2d 354, 79 S. Ct. 457, (1959)). Certain factors are "uniformly present" in cases where courts abstain from judicial action on a

particular issue pursuant to the primary jurisdiction doctrine. These include Congressional intent to imbue an administrative agency with total responsibility to resolve or address the particular issue and the need for expertise or uniformity in the administration of such a decision. *Id.* at 1363. Furthermore, while "competence of an agency to pass on an issue is a necessary condition to the application of the doctrine, competence alone is not sufficient." *Id.* "The particular agency deferred to must be one that Congress has vested with the authority to regulate an industry or activity such that it would be inconsistent with the statutory scheme to deny the agency's power to resolve the issues in question." *Id.*

Culliton contends that because the FAA Administrator has the authority to suspend or revoke medical certificates for false statements on FAA forms, it follows that no court can entertain a criminal prosecution based on those same false statements. However, simply because the FAA has the competence to deal with false statements on its applications does not mean that Congress has conferred upon it sole responsibility to penalize false statements, thereby suspending the operation of a criminal statute of general application.

Culliton points to 49 U.S.C. §§ 1301 *and* 1133 as examples of statutes that indicate Congress' intent that the FAA have the "first word" on all aviation matters. There is little in the language and legislative history of these provisions that comes close to substantiating such a sweeping claim. While it is true that the FAA plays a vital and major role in regulating aviation matters, Culliton cannot point to anything in the pertinent statutory or regulatory framework that prevents the Department of Justice from prosecuting an individual for the felony of

making false statements to a government agency. Furthermore, while the FAA is competent to determine whether an applicant has made false statements on a certificate form, it is squarely within the province of the Department of Justice to prosecute felonies of perjury and false statements.[3] *See General Dynamics Corp.*, 828 F.2d at 1366 (federal criminal litigation is an "executive function within the exclusive prerogative of the Attorney General.") (quoting *In Re Subpoena of Persico,* 522 F.2d 41, 54 (2d Cir. 1975)); *see also Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 305, 48 L.Ed.2d 643, 96 S. Ct. 1978 (1976) (common law fraud against airline carrier was not within primary jurisdiction of FAA because the "standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts"). Hence, the district court properly proceeded with Culliton's prosecution.

AFFIRMED.

---

[3] Culliton cites *Twomey v. National Transportation Safety Board,* 821 F.2d 63 (1st Cir. 1987), and *McCarthney v. Busey,* 954 F.2d 1147 (6th Cir. 1992), to support his argument that the FAA and the National Transportation Safety Board have internal procedures capable of addressing false statements made by pilots. As we stated, competence to render a particular decision does not, by itself, invoke the doctrine of primary jurisdiction.

APPENDIX 3

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES M. CULLITON, Defendant-Appellant.	No. 00-10599 D.C. No. CR-99-00537-EJG Eastern District of California, Sacramento ORDER (Filed Aug. 25, 2003)

Before: GOODWIN, HAWKINS and FISHER, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judges Hawkins and Fisher have voted to deny the petition for rehearing en banc, and Judge Goodwin recommended denial.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

APPENDIX 4

[LOGO] **AIRCRAFT OWNERS AND PILOTS ASSOCIATION**
421 Aviation Way • Frederick, MD 21701-4798
Telephone (301) 695-2000 • FAX (301) 695-2375

SENT VIA FEDERAL EXPRESS OVERNIGHT DELIVERY

July 29, 2003

Office of the Clerk
United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: *United States v. James M. Culliton*, No. 00-10599

Dear Clerk,

The Aircraft Owners and Pilots Association (AOPA) is a nationwide non-profit, membership organization, incorporated under the laws of the State of New Jersey, comprised of more than 400,000 individual pilots and aircraft owners. AOPA's members engage in the segment of aviation known as "general aviation" which accounts for two-thirds of the flying (in terms of hours flown) in the national airspace system.

It has just come to our attention that Mr. Culliton intends to petition this Court for rehearing of its decision, *United States v. James M. Culliton*, No. 00-1059 (April 30, 2003). By this 2003 decision, the Court withdrew its 2002 decision and decided instead to affirm Mr. Culliton's criminal conviction for making false entries on a Federal Aviation Administration (FAA) medical application form. Because

of the late and odd posture of this case, we are directing this letter to your attention and request that you share it with the Court, as you may deem appropriate.

On behalf of its members, AOPA is concerned with the potential impact of this Court's 2003 decision and the possible unintended consequences the decision may have on individuals completing the medical application form in the future. As it is recognized and conceded in this case, some of the questions on the FAA's Form 8500-8 are ambiguous, vague, or subject to reasonably differing interpretations, enough so that they are "capable of rendering innocent responses objectively false." *See Cullitton*, 00-10599, p. 5710. AOPA fears that the Court's decision in this case could set a precedent under which future respondents may be convicted for answering questions to the best of their knowledge and ability, with every intention of giving complete and accurate answers, but the answer is determined to be objectively false.

The Court writes, "That a respondent might feel compelled to answer 'Yes' to each of these questions does not render them 'fundamentally ambiguous.' Rather, the respondent has the option of explaining his or her answers in a separate space provided on the Form." *Id.* at 5711. Practically speaking, though, innocent omissions may easily occur because the instructions are not clear so as to limit the scope of the answer the question is attempting to elicit and because of an individual's natural tendency not to disclose each and every circumstance that could arguably fit within the language of the question, nor would the FAA want or expect them to reveal each and every circumstance, even if each cold be explained away in a separate space or page. This Court's 2003 decision may have the future effect of finding that innocent omissions, made in good faith and in

the interest of appropriate disclosure, nonetheless subjects the individual to criminal prosecution.

The Court has indicated its awareness of this issue and its determination to minimize its potential impact. To prevent innocent omissions from becoming the basis for prosecution, the Court relies on the "knowing and willful" requirement of 18 U.S.C. §1001(a), and the similar requirement that a defendant must believe in the falsity of the statement as he is making it for perjury to exist. *Culliton* at 5711. However, this element may not always effectively separate the innocent responders from those who attempt to conceal their history in order to achieve some gain. The requirement of the existence of knowing and willful falsification could be satisfied in either case, because when a respondent innocently and understandably decides not to report instances of childhood dizziness, for instance, this decision is made with the full knowledge that such dizziness did in fact occur. Therefore, under the definition as it exists in the statutes and as it is applied by the 2003 decision, by checking "No" on the form, the respondent is denying something which he knows to be technically true, but which he reasonably believes is not required to respond to the question.

The Court also states that, "In the face of ambiguity, a court may decide as a matter of law to dismiss an indictment so long as the defendant offers an innocent explanation for his testimony." *Id.* at 5711. While this language tends to reflect an intent not to allow responders to be criminally prosecuted for innocent, albeit inaccurate, responses, it appears that there may be too much latitude afforded in future cases that would not, for practical purposes, suffice to prevent the unwarranted prosecutions and convictions of individuals. This Court's decision places

a tremendous burden on an unwary accused individual to prove that his actions were innocent.

AOPA hopes to bring to this Court's attention its concern that despite the Court's expectation that innocent omissions may occur because of the potentially confusing language of the form, and the court's stated intention that such omissions should not serve as grounds for prosecution, the Court's 2003 decision, and the forthcoming decision on Mr. Culliton's petition for rehearing, could form a precedent with unintended and overreaching results. AOPA respectfully urges this Court to consider any decision it renders that may address these issues so as not to encourage or support unwarranted prosecutions or the ability to make an appropriate challenge in a future case.

Sincerely,

/s/ Kathleen A. Yodice
Kathleen A. Yodice
Counsel to AOPA

cc: Attorney for Plaintiff United States:

James Arguelles
Assistant U.S. Attorney
U.S. Attorney's Office
501 I Street, Suite 10-100
Sacramento, CA 95814

Attorney for Defendant James Culliton:

John Balazs
Attorney At Law
916 2nd Street, 2nd Floor
Sacramento, CA 95814

Applicant Must Complete
This Page (Except For Shaded Areas)
PLEASE PRINT

7 142353

Copy of FAA Form 8500-9 (Medical Certificate) or FAA Form 8420-2 Medical/Student Pilot Certificate) Issued. EE-1967955

MEDICAL CERTIFICATE SECOND CLASS AND STUDENT PILOT CERTIFICATE

This certifies that (*Full name and address*):
James Michael Culliton
1480 Sutterville, Road 24
Sacramento, CA. 95

Date of Birth	Ht.	Wt.	Hair	Eyes	Sex
09/20/46	72"	188	Brown	Hazel	Male

has met the medical standards prescribed in Part 67, Federal Aviation Regulations, for this class of Medical Certificate.

Limitations: MUST WEAR CORRECTIVE LENSES FOR DISTANT VISION AND HAVE SPARE GLASSES FOR NEAR VISION 04

Date of Examination	Examiner's Serial No.
June 06, 1997	09470-4

Examiner: Signature [signature] Typed Name Leroy B. Brown, M. D.

AIRMAN'S SIGNATURE [signature]

1. Application For: ☒ Airman Medical Certificate ☐ Airman Medical and Student Pilot Certificate
2. Class of Medical Certificate Applied For: ☐ 1st ☒ 2nd ☐ 3rd
3. Last Name CULLITON First Name JAMES Middle Name MICHAEL
4. Social Security Number 576 - 50 - 8439
5. Address Number/Street 1480 Sutterville Rd Telephone Number 916 457-34
City SACRAMENTO State/Country CA Zip Code 95822
6. Date of Birth 09 20 46 (M M D D Y Y)
7. Color of Hair BRN
8. Color of Eyes HAZEL
9. Sex M

10. Type of Airman Certificate(s) Held:
☐ None ☐ ATC Specialist ☒ Flight Instructor ☐ Recreational
☒ Airline Transport ☐ Flight Engineer ☐ Private ☐ Other
☐ Commercial ☐ Flight Navigator ☐ Student

11. Occupation DIRECTOR OF SAFETY 12. Employer Heavy Lift Helicopters

13. Has Your FAA Airman Medical Certificate Ever Been Denied, Suspended, or Revoked?
☐ Yes ☒ No If yes, give date (M M Y Y)

Total Pilot Time (Civilian only)		16. Date of Last FAA Medical Application	
14. To Date	15. Past 6 months		
15,000 est	35	01 96 (M M Y Y)	☐ No Prior Application

17. Do You Currently Use Any Medication (Prescription or Nonprescription)?
☐ Yes If yes, give name, purpose, dosage, and frequency.
☒ No

18. Medical History — Have you ever had or have you now any of the following? Answer "yes" for every condition you have ever had in your life. In the EXPLANATION box below, you may note "PREVIOUSLY REPORTED, NO CHANGE" only if the explanation of the condition was reported on a prior application for an airman medical certificate and there has been no change in your condition. See Instructions Page

	Yes	No	Condition
a.	☒	☐	Frequent or severe headaches
b.	☐	☒	Dizziness or fainting spell
c.	☒	☐	Unconsciousness for any reason
d.	☐	☒	Eye or vision trouble except glasses
e.	☐	☒	Hay fever or allergy
f.	☐	☒	Asthma or lung disease
g.	☐	☒	Heart or vascular trouble
h.	☐	☒	High or low blood pressure
i.	☐	☒	Stomach, liver, or intestinal trouble
j.	☐	☒	Kidney stone or blood in urine
k.	☐	☒	Diabetes
l.	☐	☒	Neurological disorders: epilepsy, seizures, stroke, paralysis, etc.
m.	☐	☒	Mental disorders of any sort: depression, anxiety, etc.
n.	☐	☒	Substance dependence or failed a drug test ever; or substance abuse or use of illegal substance in the last 5 years.
o.	☐	☒	Alcohol dependence or abuse
p.	☐	☒	Suicide attempt
q.	☐	☒	Motion sickness requiring medication
r.	☐	☒	Military medical discharge
s.	☒	☐	Medical rejection by military service
t.	☐	☒	Rejection for life or health insurance
u.	☒	☐	Admission to hospital
			See v. & w. Below
x.	☒	☐	Other illness, disability, or surgery

Conviction and/or Administrative Action History — See Instructions Page

	Yes	No	
v.	☐	☒	History of (1) any conviction(s) involving driving while intoxicated by, while impaired by, or while under the influence of alcohol or a drug; or (2) history of any conviction(s) or administrative action(s) involving an offense(s) which resulted in the denial, suspension, cancellation, or revocation of driving privileges or which resulted in attendance at an educational or a rehabilitation program.
w.	☒	☐	History of nontraffic conviction(s) (misdemeanors or felonies).

Explanations: See Instructions Page
a c 5 u x previously reported; NO CHANGE
v & w previously reported; No change

For FAA Use Review Action Codes

19. Visits to Health Professional Within Last 3 Years. ☒ Yes (explain below) ☐ No See Instructions Page

Date	Name, Address, and Type of Health Professional Consulted	Reason
VARIOUS 1996-1997	Kaiser permanente (HMO)	Eye check, physical check, routine check ups

- NOTICE -

Whoever in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or who makes any false, fictitious or fraudulent statements or representations, or entry, may be fined up to $250,000 or imprisoned not more than 5 years, or both. (*18 U.S. Code Secs. 1001; 3571*).

20. Applicant's National Driver Register and Certifying Declarations

I hereby authorize the National Driver Register (NDR), through a designated State Department of Motor Vehicles, to furnish to the FAA information pertaining to my driving record. This consent constitutes authorization for a single access to the information contained in the NDR to verify information provided in this application. Upon my request, the FAA shall make the information received from the NDR, if any, available to my review and written comment. Authority: 23 U.S. Code 401, Note.

NOTE: **All persons using this form must sign it. NDR consent, however, does not apply unless this form is used as an application for Medical Certificate or Medical Certificate and Student Pilot Certificate.**

I hereby certify that all statements and answers provided by me on this application form are complete and true to the best of my knowledge and I agree that they are to be considered part of the basis for issuance of any FAA certificate to me. I have also read and understand the Privacy Act statement that accompanies this form.

Signature of Applicant [signature] 119 Date 06 06 97 (M M D D Y Y)

FAA Form 8500-8 (7-92) Supersedes Previous Edition OMB Approval No. 2120-00